

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

NORMA DAYANA PEREZ,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Case No. CV 08-6860 (SH)

MEMORANDUM DECISION
AND ORDER

This matter is before the Court for review of the decision by the Commissioner of Social Security denying plaintiff's application for Disability Insurance Benefits under Sections 216(i) and 223 of the Social Security Act. Pursuant to 28 U.S.C. § 636(c), the parties have consented that the case may be handled by the undersigned. The action arises under 42 U.S.C. § 405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. The plaintiff and the defendant have filed their pleadings (Defendant's Answer; Plaintiff's Brief in Support of Complaint ["Plaintiff's Brief"]; Defendant's Brief in Support of Answer; Plaintiff's Reply to Defendant's Brief in Support of Answer ["Plaintiff's Reply"]), and the defendant has filed the certified transcript of record. After reviewing the matter, the

1 Court concludes that the decision of the Commissioner should be remanded.

2 On June 14, 2006, plaintiff Norma Dayana Perez filed an application for a period
3 of disability or Disability Insurance Benefits, alleging an inability to work since October
4 28, 2002 due to pain in her lower back, right arm, right leg and neck. (Administrative
5 Record ["AR"] 74-78, 85, 99). On January 15, 2008 (incorrectly dated January 15,
6 2007), an Administrative Law Judge ("ALJ"), who found that plaintiff had two severe
7 impairments -- a lumbar spine condition and a cervical spine condition -- determined that
8 plaintiff was not disabled within the meaning of the Social Security Act. (AR 20-25).

9 Following the Appeals Council's denial of plaintiff's request for a review of the
10 hearing decision (AR 1-3), plaintiff filed an action in this Court.

11 Plaintiff makes two challenges to the ALJ's Decision denying benefits. Plaintiff
12 alleges that the ALJ erred (1) in failing to properly assess plaintiff's residual functional
13 capacity; and (2) failing to state specific, clear and convincing reasons for finding
14 plaintiff's testimony not credible.

15 Plaintiff also contends that the case should be remanded for consideration of new
16 evidence: (1) a June 27, 2008 report from Dr. Rafael Quinonez, a neurosurgeon, stating
17 that following a lumbar spine MRI on March 7, 2008, plaintiff was examined on March
18 14, 2007, and per Dr. Quinonez's recommendation, a discectomy was performed on
19 plaintiff's lumbar spine [L4-L5 and L5-S1] on June 27, 2008 (see Plaintiff's Brief,
20 Exhibit A); and (2) a February 2, 2009 Physical Residual Functional Capacity
21 Questionnaire, wherein Doctor Quinonez stated that plaintiff had the following residual
22 functional capacity: lifting/carrying less than 10 pounds frequently, 10 pounds
23 occasionally, and more than 20 pounds never; standing/walking at least 2 hours in an 8-
24 hour weekday; sitting less than 6 hours in an 8-hour weekday; pushing/pulling were
25 affected; never bending, climbing, crouching, balancing, kneeling, or crawling; and
26 reaching occasionally (see Plaintiff's Brief, Exhibit B). (See Plaintiff's Brief at 6-7;
27 Plaintiff's Reply at 2-3).

1 The Court may order a case remanded to the Commissioner for further
2 consideration “only upon a showing that there is new evidence which is material and that
3 there is good cause for the failure to incorporate such evidence into the record in a prior
4 proceeding.” 42 U.S.C. § 405(g); Allen v. Secretary of Health & Human Servs., 726 F.2d
5 1470, 1473 (9th Cir. 1984).

6 To be material, the new evidence must bear directly and substantially on the matter
7 in issue and there must be a real possibility that the new evidence would have changed
8 the outcome if it been before the Commissioner. Cotton v. Bowen, 799 F.2d 1403, 1409
9 (9th Cir. 1986). “At a minimum, such evidence must be probative of mental or physical
10 impairment.” Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985). Evidence is new and
11 material only where it relates to the period on or before the date of the ALJ’s decision.
12 See 20 C.F.R. § 404.970. However, “reports containing observations made after the
13 period of disability are relevant to assess the [plaintiff’s] disability. It is obvious that
14 medical reports are inevitably rendered retrospectively and should not be disregarded
15 solely on that basis.” Smith v. Bowen, 849 F.2d 1222, 1225 (9th Cir. 1988); Kemp v.
16 Weinberger, 522 F.2d 967, 969 (9th Cir. 1975).

17 The good cause requirement is satisfied if new information surfaces after the
18 Commissioner’s final decision and the claimant could not have obtained that evidence at
19 the time of the administrative proceeding. Key v. Heckler, supra. Remand is proper
20 where additional administrative proceedings could remedy the defects. Bilby v.
21 Schweiker, 762 F.2d 716, 719 (9th Cir. 1985).

22 Here, the new evidence submitted by plaintiff bears directly on the severity of
23 plaintiff’s impairment, and there is a real possibility that such evidence would have
24 changed the ALJ’s decision. Further, since such evidence was not available prior to the
25 date of the ALJ’s decision, there is good cause for plaintiff’s failure to incorporate it into
26 the record in the prior proceeding.
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ORDER

For the foregoing reasons, the decision of the Commissioner is remanded pursuant to Sentence 6 of 42 U.S.C. § 405(g).

DATED: December 9, 2009

/ s /

STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE